IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

IMS HEALTH INCORPORATED; VERISPAN, LLC; and SOURCE HEALTHCARE ANALYTICS, INC., a subsidiary of WOLTERS KLUWER, HEALTH INC. , Plaintiffs, v. WILLIAM H. SORRELL, as Attorney General of the State of Vermont, Defendant.	File No. 1:07-CV-188 Lead Case
PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, Plaintiff, v. WILLIAM H. SORRELL, in his official capacity as Attorney General of the State State of Vermont; JIM DOUGLAS, in his official capacity as Governor of the State of Vermont; and CYNTHIA D. LAWARE in her official capacity as the Secretary of the Agency of Human Services of the State of Vermont, Defendants.	File No. 1:07-CV-220 (Member Case)

TRIAL BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.Civ.P. 7.1, the Washington Legal Foundation (WLF) states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation nor any stock owned by a publicly held company.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

IDENTITY AND INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. COURTS TRADITIONALLY HAVE EMPLOYED EXACTING SCRUTINY OF STATUTES ALLEGED TO INFRINGE FIRST AMENDMENT RIGHTS, WITHOUT DEFERRING TO LEGISLATIVE FINDINGS REGARDING JUSTIFICATIONS FOR SUCH INFRINGEMENT 8

II. *TURNER I* AND *TURNER II* ESTABLISHED THAT DEFERENCE TO LEGISLATIVE FACT-FINDING IS APPROPRIATE IN CASES INVOLVING CHALLENGES TO CONTENT-NEUTRAL SPEECH RESTRICTIONS 10

III. *TURNER I* AND *TURNER II* DO NOT SUGGEST THAT THE COURT SHOULD DEFER TO LEGISLATIVE FACT-FINDING BY THE VERMONT LEGISLATURE IN CONNECTION WITH LEGISLATION THAT IS NOT CONTENT-NEUTRAL 14

IV. DEFERENCE IS UNWARRANTED FOR THE ADDITIONAL REASON THAT THE VERMONT LEGISLATURE NEVER ENGAGED IN A FACT-FINDING ENTERPRISE EVEN REMOTELY SIMILAR TO THE EXTENSIVE FACT-FINDING AT ISSUE IN *TURNER I* AND *TURNER II* 18

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases:

Ashcroft v. ACLU,
542 U.S. 656 (2005) 8

Bartnicki v. Vopper,
532 U.S. 514 (2001) 8, 15

Bd. of Trustees v. Fox,
492 U.S. 469 (1989) 9

Burson v. Freeman,
504 U.S. 191 (1992) 8, 9

Central Hudson Gas & Electric Corp. v. Public Service Comm'n,
447 U.S. 557 (1980) 4, 10, 14

Edenfield v. Fane,
507 U.S. 761 (1993) 9

Fox v. Leavitt,
No. 06-1490 (D.D.C., filed Aug. 24, 2006) 1

Gonzales v. Reich,
545 U.S. 21 (2003) 19

IMS Health, Inc. v. Ayotte,
490 F. Supp. 2d 163 (D.N.H. 2007) 1, 20, 21

Landell v. Sorrell,
382 F.3d 91 (2d Cir. 2002), *rev'd*, 548 U.S. 230 (2006) 16

Los Angeles Police Dep't v. United Reporting Publishing Co.,
528 U.S. 32 (1999) 18

Nike v. Kasky,
539 U.S. 654 (2003) 1

Randall v. Sorrell,
548 U.S. 230 (2006) 15, 16

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 9

Simon & Schuster, Inc. v. Members of New York State Crimes Victims Board,
502 U.S. 105 (1991) 17

Smith v. Daily Mail Publishing Co.,
443 U.S. 97 (1979) 8

Texas v. Johnson,
491 U.S. 397 (1989) 8

Thompson v. Western States Medical Center,
535 U.S. 357 (2002) 9, 14

Turner Broadcasting System, Inc. v. Federal Communications Comm'n.,
512 U.S. 622 (1994) ("*Turner I*") . . . . . *passim*

Page

Turner Broadcasting System, Inc. v. Federal Communications Comm'n.,
520 U.S. 180 (1997) ("*Turner II*") . . . . *passim*

United States v. O'Brien,
391 U.S. 367 (1968) 5, 12, 13

Washington Legal Found. v. Friedman,
13 F. Supp. 2d 51 (D.D.C. 1998),
appeal dism'd, 202 F.3d 331 (D.D.C. 2000) 1

Statutes and Constitutional Provisions:

U.S. Const., amend i . . . . *passim*

Cable Television Consumer Protection and Competition Act of 1992,
§§ 4 and 5, 47 U.S.C. §§ 534 and 535 . . . . 11, 18

Vermont Acts No. 80 (the "Act") . . . . *passim*
§ 1 . . . . 19, 20
§ 1(31) 20
§ 17(d), 18 Vt. Stat. Ann. § 4631(d) 2, 7, 17, 19
§ 20 2
§ 21 2

Vermont Acts No. 89 2

Miscellaneous:

Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. R. 2312 (1998) 16

TRIAL BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS

INTERESTS OF *AMICUS CURIAE*

The filing of this *amicus curiae* brief by the Washington Legal Foundation (WLF) is authorized by the Court's minute entry of January 31, 2008 (Document Number 117). WLF is a public interest law and policy center with supporters in all 50 states, including many in Vermont. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to promoting the free speech rights of the business community, appearing before numerous federal courts in cases raising First Amendment issues. *See, e.g., Nike v. Kasky*, 539 U.S. 654 (2003). WLF has successfully challenged the constitutionality of Food and Drug Administration restrictions on speech by pharmaceutical manufacturers. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd*, 202 F.3d 331 (D.C. Cir. 2000). WLF recently filed suit against the federal Centers for Medicaid and Medicare Services, raising a First Amendment challenge to CMS restrictions on truthful speech by health care providers. *Fox v. Leavitt*, No. 06-1490 (D.D.C., filed Aug. 24, 2006). WLF filed *amicus* briefs in both the district court and the First Circuit in the litigation challenging New Hampshire statutory provisions similar to those at issue here. *IMS Health, Inc. v. Ayotte*, 490 F. Supp. 2d 163 (D.N.H. 2007), *appeal docketed*, No. 07-1945 (1st Cir. June 20, 2007).

WLF is concerned that by unduly restricting the dissemination of truthful information by pharmacists and others, Vermont is hindering improvements in public health. This brief addresses First Amendment issues only; WLF does not address Plaintiffs' separate constitutional claims that § 17 of Vermont Acts No. 80 (the "Act") is void for vagueness and violates the Commerce Clause, or the challenges to §§ 20 and 21 of the Act raised by Plaintiff Pharmaceutical Research and Manufacturers of America (PhRMA). In particular, the brief explains why it would be inappropriate for this Court, when considering the Plaintiffs' First Amendment claims, to defer to the conclusions of the Vermont legislature regarding the supposed need for restrictions on truthful speech.

STATEMENT OF THE CASE

Plaintiffs IMS Health Inc. (IMS), Verispan, LLC, and Source Healthcare Analytics, Inc. (the "Publisher Plaintiffs") and Plaintiff PhRMA are seeking a declaration that § 17(d) of the Act violates their First Amendment rights, and a permanent injunction against its enforcement.[1] Section 17(d) of the Act provides, *inter alia*, that (subject to limited exceptions) no "prescriber-identifiable data" relative to prescription information may be used for "marketing or promoting a prescription drug" by a "health insurer, a self-insured employer, an electronic transmission intermediary, a pharmacy, or other similar entity." 18 Vt. Stat. Ann. § 4631(d).

The Publisher Plaintiffs are companies in the business of collecting and distributing health information, research, and analysis. Prior to adoption of the Act, they regularly purchased prescription information from Vermont pharmacies; such information contained no patient-identifiable data but did contain data regarding prescriptions written by identifiable Vermont doctors. As outlined in detail in their motion for a preliminary injunction, the

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[1] Section 17 of the Act (which was amended by Vermont Acts No. 89 (2008)), is codified as Vt. Stat. Ann. tit. 18, § 4631.

Publisher Plaintiffs used that prescriber-identifiable data for a wide variety of purposes. Plaintiffs' analysis of the data allowed them to determine which doctors prescribe which drugs, information which has been extremely valuable to pharmaceutical and biotech companies (including members of Plaintiff PhRMA), academic and medical researchers, government agencies, and others. However, the Act now prohibits Publisher Plaintiffs from using or selling the results of their analysis (or even arranging for the transfer of prescriber-identifiable data to them from pharmacies) under any circumstances that could be deemed to constitute "use . . . for marketing or promoting a prescription drug." *Id.*

Plaintiffs contend that the Act, by imposing content-based restrictions on their rights to convey truthful information to others and/or to receive such information, violates their rights under the First Amendment to the United States Constitution. They contend that the restrictions are subject to "strict scrutiny" because they purport to regulate fully protected speech, a scrutiny (Plaintiffs contend) that the Act cannot hope to withstand. Alternatively, Plaintiffs contend that the speech restrictions are subject to heightened scrutiny under the First Amendment standards applicable to commercial speech and that the restrictions are invalid under those standards as well.

Vermont has sought to defend its legislation as serving its interests in reducing prescription drug costs and upholding the privacy interests of doctors. In their opposition to the motion for preliminary injunction, attorneys for Vermont asserted that federal courts ought to defer to the Vermont legislature's conclusion that the Act will actually achieve those goals. Attorneys for Vermont have sought support for that conclusion in two Supreme Court decisions that touch on the propriety of judicial deference to legislative fact-finding: *Turner*

Broadcasting System, Inc. v. Federal Communications Comm'n, 512 U.S. 622 (1994) ("*Turner I*"); and *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 520 U.S. 180 (1997) ("*Turner II*"). WLF is filing this brief to respond to Vermont's deference arguments. WLF respectfully submits that the deference described in *Turner I* and *Turner II* is wholly misplaced in these proceedings.

SUMMARY OF ARGUMENT

The federal courts have long recognized that the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages conveyed by private individuals. While the courts have very occasionally upheld content-based speech restrictions, they have always imposed on the government a heavy burden of demonstrating the necessity of such restrictions. Even when the speech on which restrictions are imposed is deemed "commercial speech" – that is, speech that does no more than propose a commercial transaction – courts have made clear that it is the regulators who bear the burden of justifying their content-based speech restrictions. In none of the cases in which the U.S. Supreme Court has addressed First Amendment challenges to restrictions on commercial speech has the Court so much as suggested that it was willing to defer to a legislature's determinations regarding the need for such restrictions or their likely effectiveness.

Plaintiffs contend that the speech restrictions imposed by the Act are fully protected speech subject to strict judicial scrutiny. Should the speech silenced by the Act ultimately be deemed to constitute commercial speech, Plaintiffs argue in the alternative that the Act cannot survive review under the *Central Hudson* test, the test normally applied to restrictions imposed on commercial speech. Regardless which of those two standards of review is ultimately adopted by this Court, there is no support in First Amendment case law for an argument that the Court should defer to any fact-finding engaged in by the Vermont legislature when it adopted the Act. Rather, for Vermont to demonstrate to this Court that there is a sufficient factual predicate for the speech restrictions imposed by the Act, it is incumbent upon Vermont to provide to the Court competent evidence to support its factual claims.

The Supreme Court has counseled deference to legislative fact-finding in one and only one type of First Amendment challenge: cases in which government regulations have an incidental impact on speech but the regulations are content-neutral; that is, the regulations impose restrictions without regard to the content of the speech at issue. *Turner I* and *Turner II* are the most prominent examples of Supreme Court willingness to defer to congressional fact-finding when reviewing First Amendment challenges to content-neutral speech restrictions. Those cases involved the cable industry's challenge to the "must carry" provisions of a 1992 federal law, whereby cable television operators were required to devote a percentage of their channels to the transmission of local broadcast television stations. The Court determined that the "must carry" provisions were content-neutral because they were imposed without regard to the content of programming broadcast by the over-the-air stations whose signals the cable operators were required to carry. Under those circumstances, the Court determined that the "must carry" provisions should be reviewed under an intermediate standard of First Amendment scrutiny set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).[2] *Turner I*, 512

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[2] Under *O'Brien*, a content-neutral regulation will be sustained if:

[I]t furthers an important or substantial governmental interest; if the government

U.S. at 662.

In determining whether the "must carry" provisions could meet the *O'Brien* test, the Court said that it was appropriate for courts to defer to congressional fact-finding regarding the need for those provisions, whether those provisions would actually further the federal government's goals, and whether Congress could achieve its goals through measures that were less intrusive on First Amendment rights. *Turner I*, 512 U.S. at 665-67; *Turner II*, 520 U.S. at 195-96. The Court nonetheless cautioned that even in the context of review of content-neutral statutes, deference should not extend to the ultimate determination of constitutional law, nor did it foreclose independent judicial review of congressional fact-finding. *Turner I,* 512 U.S. at 666 ("[T]he deference afforded to legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law.").

Nothing in *Turner I* or *Turner II* suggests that the deference afforded congressional findings made in connection with content-neutral statutes should extend to legislative findings made in connection with statutes, such as the Act, that quite clearly are *not* content-neutral. Such deference may on occasion be warranted when a statute is content-neutral, because under those circumstances there is no reason to suspect that any speech restrictions imposed by the statute are motivated by legislative hostility to the content of the affected speech. But such suspicion inevitability arises whenever speech is made subject to regulation based on its subject matter, rendering inappropriate any overriding presumptions of regularity. Under those

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> interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

circumstances, the Supreme Court has invariably imposed the burden on government regulators to produce any and all evidence necessary to justify their speech restrictions, without deferring to legislative findings that may have accompanied enactment of the law imposing those restrictions.

WLF does not know whether Vermont intends to argue at trial that the Act is content-neutral. But any such argument would be frivolous; the Act very clearly targets speech based on its content. The Act prohibits (in numerous settings and subject only to limited exceptions) dissemination of information concerning one very specific topic: prescription information containing "prescriber-identifiable data." 18 Vt. Stat. Ann. § 4631(d). Thus, the speech made subject to prohibition is defined *solely* by its content. Under those circumstances, judicial deference to any fact-finding by the Vermont legislature is unwarranted; the State should be required to prove, through introduction of competent evidence, that it has met the applicable First Amendment test.

In any event, there is no evidence that the Vermont legislature ever engaged in a fact-finding enterprise even remotely similar to the extensive fact-finding engaged in by Congress before it adopted the "must carry" provisions at issue in *Turner I* and *Turner II*. The Supreme Court was willing to defer to Congress's findings in part because Congress arrived at its findings only after lengthy study of regulatory schemes of "inherent complexity" involving industries "undergoing rapid economic and technological change." *Turner II*, 520 U.S. at 196. In contrast, the "findings" incorporated into the Act by the Vermont legislature were last-minute additions adopted at the suggestion of lobbyists seeking to ward off First Amendment challenges; they were not developed as a result of any fact-finding studies conducted by the legislature. Moreover, the "findings" provide no indication regarding why the legislature felt compelled to impose restrictions on truthful speech, or that Vermont first considered and rejected alternatives that would not have involved restrictions on truthful speech. Accordingly, there simply is not any legislative fact-finding to which the Court could defer even if it were so inclined. *Turner I* and *Turner II* indicate that deference to well-considered legislative fact-finding based on detailed studies is appropriate in cases involving challenges to content-neutral speech restrictions; but nothing in those cases supports Vermont's efforts to create an entirely new and deferential standard of review in First Amendment cases.

ARGUMENT

I. COURTS TRADITIONALLY HAVE EMPLOYED EXACTING SCRUTINY OF STATUTES ALLEGED TO INFRINGE FIRST AMENDMENT RIGHTS, WITHOUT DEFERRING TO LEGISLATIVE FINDINGS REGARDING JUSTIFICATIONS FOR SUCH INFRINGEMENT

The federal courts have long recognized that the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages conveyed by private individuals. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989). "As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979)). While the courts have very occasionally upheld content-based speech restrictions, they have always imposed on the government a heavy burden of demonstrating the necessity of such restrictions. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 665 (2005) ("When plaintiffs challenge a content-based speech restriction, the burden is on the government to prove that the proposed alternatives will not be as effective as the challenged statute."); *Burson v. Freeman*, 504 U.S.

191, 198 (1992).

Even when the speech on which restrictions are imposed is deemed "commercial speech" – that is, speech that does no more than "propose a commercial transaction," *Bd. of Trustees v. Fox*, 492 U.S. 469, 473 (1989) – courts have made clear that it is the regulators who bear the burden of justifying their content-based speech restrictions. *See, e.g.*, *Edenfield v. Fane,* 507 U.S. 761, 770 (1993) ("[T]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it."); *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002). The evidentiary burden is not light; for example, the government's burden of showing that a commercial speech regulation advances a substantial government interest "in a direct and material way . . . 'is not satisfied by mere speculation or conjecture; rather, a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will alleviate them to a material degree.'" *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield*, 507 U.S. at 770-71). In none of the cases in which the U.S. Supreme Court has addressed First Amendment challenges to restrictions on commercial speech has the Court so much as suggested that it was willing to defer to a legislature's determinations regarding the need for such restrictions or their likely effectiveness. Such willingness would be inconsistent with the language quoted above; the burden of demonstrating that harms are "real" and that commercial speech restrictions alleviate those harms to "a material degree" would amount to nothing if the government could meet that burden by simply pointing to legislative fact-finding.

Plaintiffs contend that the speech restrictions imposed by the Act impinge fully protected speech and thus are subject to strict judicial scrutiny. *See, e.g.*, *Burson*, 504 U.S. at

198 (content-based restrictions on non-commercial speech are subjected to "exacting scrutiny," and will be upheld only if the government can show that the restrictions are necessary to serve a "compelling state interest" and are "narrowly drawn to achieve that end.") Should the speech silenced by the Act ultimately be deemed to constitute commercial speech, Plaintiffs argue in the alternative that the Act cannot survive review under the *Central Hudson* test, the test normally applied to restrictions imposed on commercial speech.[3] Regardless which of those two standards of review is ultimately adopted by this Court, there is no support in First Amendment case law for an argument that the Court should defer to any fact-finding engaged in by the Vermont legislature when it adopted the Act. Rather, if Vermont seeks to demonstrate to this Court that there is a sufficient factual predicate for the speech restrictions imposed by the Act, it is incumbent upon Vermont to provide the Court with competent evidence to support its factual claims.

II. *TURNER I* AND *TURNER II* ESTABLISHED THAT DEFERENCE TO LEGISLATIVE FACT-FINDING IS APPROPRIATE IN CASES INVOLVING CHALLENGES TO CONTENT-NEUTRAL SPEECH RESTRICTIONS

The Supreme Court has counseled deference to legislative fact-finding in one and only one type of First Amendment challenge: cases in which government regulations have an incidental impact on speech but the regulations are content-neutral; that is, the regulations impose restrictions without regard to the content of the speech at issue. *Turner I* and *Turner II* are the most prominent examples of Supreme Court willingness to defer to congressional fact-finding when reviewing First Amendment challenges to content-neutral speech restrictions. Because Vermont, during the course of these proceedings, has cited *Turner I* and *Turner II* in support of its argument that deference to legislative fact-finding is warranted, WLF discusses those decisions at length in order to demonstrate their inapplicability to this case.

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[3] Under the four-part *Central Hudson* test, courts consider as a threshold matter whether the commercial speech concerns unlawful activity or is inherently misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, then the challenged speech regulation violates the First Amendment unless government regulators can establish that: (1) they have identified a substantial government interest; (2) the regulation "directly advances" the asserted interest; and (3) the regulation "is no more extensive than is necessary to serve that interest." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980).

Turner I and *II* involved a challenge to Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534 and 535 (the "must carry" provisions). After extensive hearings, Congress had determined *inter alia* that: many cable companies had effective monopolies on cable operations within their jurisdictions; because many households were equipped to receive television signals only through their cable systems, over-the-air television stations could not compete effectively with cable companies unless their signal was carried by those companies; cable companies had a strong economic incentive to stop carrying the signals of over-the-air stations; because cable companies had, in fact, ceased carrying the signals of many over-the-air stations, those stations were being driven out of business; and the public interest would be served by maintaining the greatest possible diversity in television programming. Accordingly, Congress adopted the "must carry" provisions to: (1) preserve the benefits of over-the-air broadcasting; (2) promote "fair" competition in the television programming market; and (3) promote the widespread dissemination of information from a multiplicity of sources. The law required cable operators to devote a percentage of their available channels to the transmission of local broadcast stations.

Turner I and *II* ultimately upheld the "must carry" provisions, in each instance by 5-4 votes. Much of *Turner I* was devoted to determining whether the "must carry" provisions should be deemed content-neutral. The Court ultimately decided that the provisions were, indeed, content-neutral because they were imposed without regard to the content of programming broadcast by the over-the-air stations whose signals the cable operators were required to carry. Under those circumstances, the Court determined that the "must carry" provisions should be reviewed under an intermediate standard of First Amendment scrutiny set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).[4] *Turner I*, 512 U.S. at 662.

In determining whether the "must carry" provisions could meet the *O'Brien* test, the Court said that it was appropriate for courts to defer to congressional fact-finding regarding the need for those provisions, and whether those provisions would actually further the federal government's goals. *Turner I*, 512 U.S. at 665 ("We agree that courts must accord substantial deference to the predictive judgments of Congress."); *Turner II*, 520 U.S. at 195 ("We owe Congress' findings deference in part because the institution is far better equipped to amass and evaluate the vast amounts of data bearing upon legislative questions") (citations omitted); *id.* at 196 ("[D]eference must be accorded to [Congress's] findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy."). Thus, the Court deferred to Congress's factual conclusion that the cable industry posed a threat to broadcast television. *Id.* at 199, 208, 211.[5]

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[4] As noted *supra* at 5 n.2, *O'Brien* provides that a content-neutral regulation will be sustained if:

> [I]t furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

Although the Court in *Turner I* and *II* deemed it appropriate to defer to some degree to Congress's explicit fact-finding in connection with its adoption of the "must carry" provisions, it is important to recognize the limited scope of that deference. In particular, nothing in *Turner I* and *II* suggests that the deference afforded congressional findings made in connection with content-neutral statutes should extend to legislative findings made in connection with statutes, such as the Act, that quite clearly are *not* content-neutral.[6] Moreover, the deference extends only to fact-finding, not to conclusions of constitutional law. *Turner I* and *II* do not suggest, for example, that courts should defer to a legislative determination that a particular speech restriction does not violate the *Central Hudson* test. Furthermore, the Court made clear that it was not intending to foreclose independent judicial review of congressional fact-finding. *Turner I,* 512 U.S. at 666 ("[T]he deference afforded to legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law."). Also, the Court granted deference to congressional fact-finding only after noting that Congress had addressed the factual issues explicitly and extensively; the "inherent complexity" of the applicable regulatory scheme; and the "rapid economic and technological change[s]" in the area. *Turner II,* 520 U.S. at 196. Those statements suggest that deference is far less warranted when the legislative fact-finding is not based on any in-depth studies, is not extensive, or involves less complex issues (and thus judges are better equipped to independently review the fact-finding). Finally, *Turner I* and *II* counsel judicial deference to fact-finding by *Congress* but are silent regarding whether federal courts should extend deference to the fact-finding of other legislative bodies.

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[5] *Turner I* determined that the "must carry" provisions were content-neutral and thus should be subject to intermediate review under the *O'Brien* test. The Court held that there was insufficient evidence regarding whether the broadcast television industry was really in jeopardy and the extent to which the "must carry" provisions would interfere with the programming decisions of cable operators. *Id.* at 667-68. Accordingly, the Court remanded the case to the district court for additional fact-finding. *Id.* at 668. The "must carry" provisions were upheld under the *O'Brien* test on remand, and the Court affirmed that decision in *Turner II.*

[6] Justice Stevens's separate opinion states explicitly that *Turner I*'s statements regarding deference apply only in the context of content-neutral statutes whose primary focus is economic regulation and whose speech regulation is only secondary. He explained:

> [W]e cannot abdicate our responsibility to decide whether a restriction on speech violates the First Amendment. But the factual findings accompanying economic measures that are enacted by Congress itself and that have only incidental effects on speech merit greater deference than those supporting content-based restrictions on speech.

Turner I, 512 U.S. at 671 n.2 (Stevens, J., concurring in part and concurring in the judgment). Because Justice Stevens's vote provided the crucial fifth vote for the majority in *Turner I,* his opinion is particularly meaningful.

III. *TURNER I* AND *TURNER II* DO NOT SUGGEST THAT THE COURT SHOULD DEFER TO LEGISLATIVE FACT-FINDING BY THE VERMONT LEGISLATURE IN CONNECTION WITH LEGISLATION THAT IS NOT CONTENT-NEUTRAL

Nothing in *Turner I* or *Turner II* suggests that the deference afforded congressional findings made in connection with content-neutral statutes should extend to legislative findings made in connection with statutes, such as the Act, that quite clearly are *not* content-neutral.

As noted above, Justice Stevens stated explicitly that deference should *not* extend beyond content-neutral statutes. Moreover, Supreme Court First Amendment decisions issued in the years after *Turner I* and *II* were decided (in 1994 and 1997, respectively) have provided no indication that the Court intended such an extension. That is true of post-*Turner* commercial speech cases (*e.g.*, *Thompson v. Western States*) and as well as post-*Turner* cases in which strict scrutiny was applied to the challenged speech restriction (*e.g.*, *Bartnicki v. Vopper*). In both types of cases, the Court not only makes no mention of deference but also continues to use language indicating that the government bears a heavy evidentiary burden of justifying its content-based speech restriction. Indeed, *Bartnicki* refused to defer to congressional fact-finding that a blanket prohibition against disclosure of illegally intercepted telephone calls would reduce the number of illegal interceptions (and instead applied strict scrutiny to strike down the blanket prohibition as a First Amendment violation), despite the dissent's explicit claim that *Turner I* and *II* required that the Court exercise such deference. *Bartnicki*, 532 U.S. at 550 (Rehnquist, C.J., dissenting).

Moreover, the Supreme Court recently has declined to defer to legislative fact-finding even in First Amendment cases involving content-neutral speech restrictions, such as laws imposing dollar limits on contributions to and expenditures by political campaigns.[7] In *Randall v. Sorrell*, 548 U.S. 230 (2006), the Court struck down a Vermont statute limiting amounts that candidates for public office could spend on their own campaigns, and limiting campaign contributions from third parties; it expressly declined to defer to the Vermont legislature's determination that the limitations were necessary to preserve electoral fairness. The Court explained that even when a challenged speech restriction is content-neutral,

[7] Uniformly applied dollar limits on political contributions and expenditures are inherently content-neutral because, given cash's fungible nature, such limits affect the quantity of speech but not its content. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 277 (2006) (Stevens, J., dissenting).

deference is not warranted where "a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote." *Id.* at 249. The Court explained that courts must exercise "independent judicial judgment" whenever "danger signs" exist that the statute may be imposing a disproportionate speech restriction – *e.g.*, speech restrictions that are content-based, or (as in *Randall*) extreme campaign finance restrictions that threaten to impede the ability of candidates to challenge incumbents. *Id.*[8]

As *Turner I* and *II* recognized, there can be valid grounds for deferring to congressional fact-finding undertaken in connection with content-neutral statutes, because under those circumstances there is no reason to suspect that speech restrictions imposed by the statute are motivated by legislative hostility to the content of the affected speech. But such suspicion inevitability arises whenever speech is made subject to regulation based on its subject matter, rendering inappropriate any overriding presumptions of regularity. As one commentator has stated, in such situations "both the content-based act and the motives of the actor are constitutionally suspect. In this context, it makes no sense for courts to accord any deference to the determinations made by those actors." Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312,

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[8] *Randall* reversed a Second Circuit decision that upheld the Vermont legislation. *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2002), *rev'd*, 548 U.S. 230 (2006). Although the Second Circuit ultimately held that the legislation did not violate the First Amendment (a holding that was later reversed), even that court cautioned against giving too much deference to legislative determinations in First Amendment cases. *Id.* at 112-13. The appeals court cautioned that "our system of judicial review provides plaintiffs the opportunity to present competing evidence, assigns to the District Court the responsibility for making findings of fact and conclusions of law after weighing the evidence, and leaves to the Court of Appeals the independent responsibility to assess the legal significance of these factual findings." *Id.* at 114.

2324 (1998).

WLF does not know whether Vermont intends to argue at trial that the Act is content-neutral. But any such argument would be frivolous; the Act very clearly targets speech based on its content. The Act prohibits certain uses of information concerning one very specific topic: prescription information containing "prescriber-identifiable data." 18 Vt. Stat. Ann. § 4631(d). Thus, the speech made subject to prohibition is defined *solely* by its content. The Supreme Court has made clear that any such speech restrictions should be deemed content-based. *See, e.g., Turner I*, 512 U.S. at 643 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based."). It makes no difference that the Act does not seek to silence a particular idea or viewpoint; it is sufficient to categorize a restriction as content-based if the restriction applies to all speech on a single topic regardless of the viewpoint expressed. *See, e.g., Simon & Schuster, Inc. v. Members of New York State Crimes Victims Board*, 502 U.S. 105, 117 (1991) (in determining whether a regulation of speech is content-based, "it is irrelevant whether the state is trying to suppress particular ideas."). Under these circumstances, extending judicial deference to any fact-finding by the Vermont legislature is unwarranted; the State should be required to prove, through introduction of competent evidence, that it has met the applicable First Amendment standard.

Vermont has raised a somewhat related argument that is equally lacking in merit. Vermont claims that the Act should not be deemed regulation of speech at all, but rather should be a deemed regulation of the "use" of information. *See* Defendants' Memorandum of

Law in Opposition to Part I of PhRMA's Motion for Summary Judgment, at 5-18. Vermont argues that the Act's prohibition on the "use" of certain information for commercial purposes is merely a regulation of "an act or conduct" that does not implicate First Amendment values. *Id.* at 16. Vermont's effort to distinguish between speech and conduct is without merit, given that the "conduct" that the State seeks to regulate is the distribution of information with very specific content. In a factually analogous context, all nine Supreme Court justices indicated that regulation of the type being attempted by Vermont should be deemed regulation of speech. *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999).[9]

IV. DEFERENCE IS UNWARRANTED FOR THE ADDITIONAL REASON THAT THE VERMONT LEGISLATURE NEVER ENGAGED IN A FACT-FINDING ENTERPRISE EVEN REMOTELY SIMILAR TO THE EXTENSIVE FACT-FINDING AT ISSUE IN *TURNER I* AND *TURNER II*

A key feature of *Turner I* and *II* was the extensive investigation undertaken by Congress over a three-year period before it adopted the Cable Television Consumer Protection and Competition Act of 1992. In upholding the law's "must carry" provisions, the Supreme

[9] In *United Reporting*, the plaintiffs facially challenged a California statute that prohibited disclosure of police department arrest records to firms that refused to agree not to use those records for commercial purposes. A majority of the Court rejected the facial challenge, finding that the First Amendment was not implicated when a government allows some citizens access to public records but denies access to others. But all nine justices agreed that if the plaintiffs could gain access to the records without government assistance, any government effort to prevent their use of the records would implicate the First Amendment. *See United Reporting*, 528 U.S. at 40 ("This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses."); *id.* at 42-43 (Ginsburg, J., with whom O'Connor, Souter, and Breyer, JJ., join, concurring) ("Anyone who comes upon arrestee information in the public domain is free to use the information as she sees fit. [Once the information is published in a legal newspaper, the challenged statute] *would indeed be a speech restriction if it then prohibited people from using that published information to speak to or about arrestees.*") (emphasis added); *id.* at 46 (Stevens, J., with whom Kennedy, J., joins, dissenting).

Court made clear that Congress's adoption of factual findings after having engaged in an extensive investigation of a complex subject played a significant role in the Court's willingness to defer to legislative fact-finding. *Turner II*, 520 U.S. at 195, 196. In contrast, the Court has made clear that it is far less likely to defer to congressional fact-finding in First Amendment cases when Congress has failed to make particularized findings of the type at issue in *Turner I* and *II*. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 21 (2006) (Court will insist on particularized factual findings from Congress in connection with legislation, when there is "a special concern, such as the protection of free speech.").

There is no evidence that the Vermont legislature ever engaged in a fact-finding enterprise even remotely similar to the extensive fact-finding engaged in by Congress before it adopted the "must carry" provisions at issue in *Turner I* and *Turner II.* The Supreme Court was willing to defer to Congress's findings in part because Congress arrived at its findings only after lengthy study of regulatory schemes of "inherent complexity" involving industries "undergoing rapid economic and technological change." *Turner II*, 520 U.S. at 196. In contrast, the Vermont legislature adopted the Act without conducting – or even being aware of – a single study concluding that a law prohibiting the sale of truthful prescriber-identifiable information for marketing a prescription drug without prescriber consent would directly or materially advance the interests that caused Vermont to enact the Act. *See* Defendants' Responses to the Publisher Plaintiffs' Requests for Admissions, Nos. 6-8.

Although the Act included (in Section 1) legislative findings regarding why the § 17(d)'s speech restrictions were warranted, those findings were not the product of a lengthy fact-finding process but rather were added as last-minute amendments to the legislation – in response to the April 2007 district court decision striking down New Hampshire's nearly identical speech restrictions. *IMS Health, Inc. v. Ayotte*, 490 F. Supp. 2d 163 (D.N.H. 2007).[10] Moreover, the 31 "findings" listed in Section 1 consist largely of broad-based criticisms of marketing activities conducted by the pharmaceutical industry; the vast majority bear little or no relation to issues relevant to a First Amendment lawsuit. The only legislative finding relevant to whether the Act directly advances the interests Vermont has identified as the justification for § 17(d) of the Act is the 31st and final finding:

> This act is necessary to protect prescriber privacy by limiting marketing to prescribers who choose to receive that type of information, to save money for the state, consumers, and businesses by promoting the use of less expensive drugs, and to protect public health by requiring evidence-based disclosures and promoting drugs with longer safety records.

Vermont Acts No. 80, § 1(31).

The conclusory "findings" recited above are not the type of detailed legislative findings that *Turner I* and *Turner II* deemed worthy of deference. Finding 31 fails to explain why the legislature concluded that its speech restrictions would lead to reduced marketing efforts, or would save money, or would promote the use of less expensive drugs, or would promote public health. Vermont may be able to prove all those things at trial; but unexplained legislative assertions that a statute will produce positive results are not entitled to deference from the courts.

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[10] The New Hampshire federal district court determined that it should not defer to the New Hampshire legislature's predictive judgments, in part because the legislature had made no formal findings regarding its determination that speech restrictions would lead to improved health care. *Id.* at 177 n.12. Vermont legislators apparently believed that adding last-minute factual findings to the Act would improve the State's ability to raise a deference claim in subsequent litigation.

Indeed, the "findings" were silent regarding narrow tailoring: whether Vermont legislators decided to impose speech restrictions only after determining that non-speech alternatives would be inadequate to meet their needs. Accordingly, there simply is not any legislative fact-finding to which the Court could defer even if it were so inclined.

Moreover, any claim that Vermont's "findings" were the product of carefully considered legislative fact-finding is belied by the record developed in this litigation, as explained in the Publisher Plaintiffs' Motion to Compel Discovery, filed June 3, 2008:

- The Vermont legislature did not even begin to consider imposing speech restrictions regarding prescriber-identifiable data until officials with the National Legislative Association for Prescription Drug Prices (NLARx) suggested such legislation in early 2007.

- After a bill was proposed in February 2007, legislators conducted several hours of hearings on the bill in the early spring, consisting primarily of testimony of supporters. While supporters claimed that the bill's speech restrictions would reduce drug costs and improve health care delivery, they submitted no studies purporting to substantiate those claims.

- When the House Health Care Committee approved a speech restriction bill on April 25, 2007, it contained no legislative findings. The bill was scheduled for a vote in the full House on May 3, 2007.

- The New Hampshire federal district court issued its decision in *IMS Health, Inc. v. Ayotte* on April 30, 2007. The court explicitly declined to defer to the New Hampshire legislature's predictive judgments regarding the likely effects of imposing speech restrictions on prescriber-identifiable data.

- In response to the New Hampshire decision, the Vermont legislature put together the list of 31 "findings" and amended the bill to include those "findings" as Section 1. The amendment process was completed within three days of the New Hampshire court decision, and the bill was adopted by the House on May 3, 2008.

- Legislators did not have adequate time between April 30 and May 3, 2007 to carefully consider the likely effects of its proposed legislation and to conduct studies that could serve as the predicate for factual findings. Indeed, it was for precisely that reason that several legislators protested the decision to go ahead with a May 3, 207 vote on the amended legislation; they asserted that legislators could not possibly make informed decisions within the allotted three days regarding whether the factual findings added to the last minute were warranted.

- Emails dated May 2, 2007 indicate that the "findings" were not drafted by Vermont legislators or their staff, but rather by out-of-state officials with the NLARx, including Sean Flynn. The emails indicate that the entire process of drafting "findings" was a litigation-driven exercise, designed to shore up arguments that courts reviewing the Act should defer to the Vermont legislature's predictive judgments. The emails belie any effort to portray the "findings" as well-considered predictive judgments arrived by the legislature only after careful and thorough deliberation.

- Counsel for Vermont later conceded that computer hard drives belonging to Vermont were destroyed in December 2007 (after Plaintiffs had served document requests) and that counsel did not know how many relevant emails from 2007 – and from the April 30 to May 3, 2007 period in particular – were rendered unretrievable thereby. Given Vermont's responsibility for that destruction of records, it is fair to presume that missing records would have confirmed what is apparent from the remainder of the record – that the "findings" were an exercise in papering the record, not a reflection of well-considered legislative judgments. The integrity of the fact-finding process is further undermined by emails demonstrating that witnesses appearing in support of the legislation were asked to post-date communications with Vermont (a request apparently designed to conceal the favored treatment that had been afforded supporters of the legislation).

Counsel for Vermont asserts that the destruction of emails is irrelevant and, indeed, that the entire process by which the legislative findings were adopted is irrelevant. Rather, counsel asserts, once a State legislature adopts findings in connection with legislation, it is inappropriate for courts to look behind those findings to examine the process by which they were adopted. Those assertions cannot be squared with *Turner I* and *Turner II*, which made clear that the deference to be afforded legislative findings in First Amendment cases is dependent on the nature of the investigation that preceded adoption of the findings.

Congress, of course, has available to it huge amounts of investigatory resources, resources available neither to federal courts nor Vermont. *Turner II* cited to that disparity in resources as one reason why federal courts should defer to congressional fact-finding. *Turner*

II, 520 U.S. at 195 ("We owe Congress's findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.") That rationale calls into question whether federal courts should ever defer to State legislatures (with their far more limited resources than Congress) with respect to fact-finding in First Amendment cases. But even if federal court deference to State legislatures might sometimes be appropriate, it certainly is not appropriate in cases, such as this one, in which the State legislature adopted the Act without first addressing in at least some detail such fundamental questions as what effect the Act would be likely to have on overall drug pricing, whether the law would decrease the number of sales visits that drug company representatives pay to Vermont doctors, or whether it would lead to *increased* sales calls because sales representatives, in the absence of prescriber-identifiable data, would be unable to limit their marketing to doctors who are heavy users of their company's drugs.

CONCLUSION

Amicus curiae Washington Legal Foundation (WLF) respectfully requests that the Court not defer to any conclusion of the Vermont legislature that the Act will actually achieve its goals in a narrowly tailored manner. WLF further requests that the Court grant judgment for the Plaintiffs on their First Amendment claims.

Respectfully submitted,

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Date: June 23, 2008

Counsel wish to thank Brandon Durrett, a student at Texas Tech University Law School, for his assistance in drafting this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the attached Brief of Washington Legal Foundation as *amicus curiae* has been served electronically on the following counsel of record on this 23rd day of June 2008, via the Court's electronic service system:

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